

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.*

Plaintiffs,

vs.

TYSON FOODS, INC., *et al.*

Defendants.

Case No. 05-CV-0329-GKF-PJC

**RESPONSE OF GEORGE’S, INC. AND GEORGE’S FARMS INC.  
IN OPPOSITION TO PLAINTIFFS’ MOTION TO COMPEL [DKT # 1867 ],  
AND MOTION OF GEORGE’S, INC. AND GEORGE’S FARMS INC. FOR  
PROTECTIVE ORDER AND INTEGRATED BRIEF IN SUPPORT THEREOF**

Separate Defendants, George’s, Inc. and George’s Farms, Inc., submit the following Response in Opposition to State of Oklahoma’s Motion to Compel George’s, Inc. and George’s Farms, Inc. (“George’s”) to Respond to Discovery Seeking Financial Information (Docket #1867), and further move the Court to deny the State’s Motion and also to issue a Protective Order for George’s prohibiting the State from seeking additional financial information from George’s. For its response to Plaintiffs’ Motion to Compel (Dkt. # 1867), George’s states that, contrary to the LCvR 37.1 certification in their Motion, Plaintiffs did not contact George’s to notify that the State was filing the instant Motion to Compel. Accordingly, LCvR37.1 seemingly obliges the Court to refuse to consider the Motion. However, should the Court choose to consider the Motion, George’s further states as follows:

**I. Introduction**

George’s, Inc. and George’s Farms, Inc. are privately held corporations. No publicly held corporation owns stock in George’s, Inc. or George’s Farms, Inc. (Dkt. #87). As a closely-held

family company, George's has always maintained a legitimate claim to privacy regarding all corporate financial documents.

In its Motion to Compel submitted on February 17, 2009, the State seeks discovery of potentially thousands of pages of financial documents from George's – such as: income and cash flow documents for the past six years, the corresponding notes for these financial statements; complete filed tax returns for 2006 and 2007 (including all supporting schedules, disclosures, and detailed appreciation schedules); copies of any appraisal valuation or estimation of value regarding George's business operations; copies of George's business plans, financial projections, forecasts, and pro forma financial statements; and copies of internal budgets and forecasts (Dkt. #1867).

The State asserts that it is entitled to discovery of all of the documents it seeks merely because it has alleged that it is entitled to recover punitive damages from George's in this case. George's in no way has acted with the requisite culpability required by OKLA. STAT. tit. 23, § 9.1. George's denies that the State is entitled to punitive damages and denies that the State will be able to present a *prima facie* case in support of its punitive damages claim against George's. In fact, over the last five years the State has attempted to discover information sufficient to prove a punitive damages claim. Yet the State has not, to-date, produced any evidence of intentional, reckless, willful, or wanton conduct by George's, its employees, or the independent growers that contract with George's. If the State has not produced such information within a mere eight weeks of the discovery deadline, it seems highly doubtful a *prima facie* case for punitive damages exists against George's.

However, George's is aware that because the State has made allegations of intentional and reckless conduct, George's may be required by the Court to disclose certain limited financial information. With this awareness and in the spirit of a cooperative discovery process, George's

produced to the State balance sheets showing its net worth for the past five years, and income/expense statements showing its income for the past five years. While these productions contain more financial information than George's should be required to disclose, the State remains unsatisfied.

## **II. Factual Background**

The State initiated this action more than three and a half years ago. In the original Complaint filed on June 18, 2005, the State included a claim for punitive damages against all-named Defendants, including George's. (Dkt. #2). Over a year later, on July 10, 2006, the State requested that George's produce financial documents and materials relating to its net worth; George's responded by objecting to disclosure of these private and confidential documents (Pls. Ex. A, Dkt. #1867-2). Additionally, George's noted that its corporate financial documents are not organized by watershed; therefore such documents were not discoverable given that only its operations in the Illinois River Watershed are at issue in the case. A subsequent Request for Production from the State was served on George's in excess of another year later on September 13, 2007, and George's reiterated the same objections. (Pls. Ex. B, Dkt. #1867-2).

After waiting yet another year, in late October 2008, the State mailed a list to George's counsel which claimed to "narrow" the scope of the financial discovery requested. (Pls. Ex. C, Dkt. #1867-2). In fact, this list was also overly-broad and actually sought a wider range of financial documents than previously requested by way of formal discovery, including a great deal of information which the State is not entitled to discover. The State and George's conducted a meet-and-confer process during November and early December of 2008. During this process, George's counsel verbally expressed doubt that the State could prove entitlement to income tax returns or to

anything beyond net worth information. Accordingly, an agreement was reached in which disclosure of George's net worth over a 5-year period by way of balance sheets would satisfy the State's requests. Counsel for George's explained that this was all that George's was willing to voluntarily produce at that time. Without waiving objections, George's produced its Balance Sheets to the State on December 8, 2008. *See* Exs. A and B.<sup>1</sup>

Unfortunately, the State reneged on this agreement several days after this production, and claimed that the results of the meet and confer process were not satisfied by the production. In a good-faith effort to continue the discovery process un-aided by the Court's intervention, George's reconsidered the State's requests and decided to also produce, without waiving objections, George's Income Statements. George's again advised the State that it would not produce anything further in the way of financial documents for George's by way of an email dated December 24, 2008. (Exh F) On January 2, 2009 the Income Statements were produced to the State. *See* Exs. C and D.<sup>2</sup>

As the Court will see upon review of these documents, George's has provided more than ample information for the State to possess a clear understanding of George's financial condition and situation. These documents, spanning August 28, 2004 through August 30, 2008 provide information including, but not limited to:

- Current assets (accounts receivable and inventories);
- Property, plant and equipment (land, buildings, machinery, equipment, and leasehold improvements) and depreciated values;
- Liabilities (accounts payable and other current liabilities);

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<sup>1</sup> Due to the highly confidential nature of the information contained in George's Net Worth and Balance Sheets, a copy of this exhibit will be provided to the Court under a separate cover for an *in camera* review, pursuant to Paragraph 6 of the Confidentiality Order (Dkt. #985).

<sup>2</sup> Due to the highly confidential nature of the information contained in George's Income Statements, a copy of this exhibit will be provided to the Court under a separate cover for an *in camera* review, pursuant to Paragraph 6 of the Confidentiality Order (Dkt. #985).

- Deferred income taxes; and
- Stockholders' equity (common stock and retained earnings).

In *City of Tulsa, et al v. Tyson Foods, Inc. et al.*, Case No. 01-CV-900-B, the parties grappled through a similar discovery dispute. In the *Tulsa* case, the Court held that the defendants (including George's) were required to produce "documents reflecting their net worth" for the past five years. Because the jurisdiction and venue for the *Tulsa* case are the same as the instant case, George's chose to follow that order as guidance. In this vein, George's produced its Balance Sheets for the most recent five years. In addition, George's chose to go beyond the finding in that case and provide the State with Income Statements from 2004 through the most recent completed statements. These documents wholly reflect George's net worth and income from an accounting standpoint over the latest 5 year period of time.

While the State contends that these documents are in some way deficient because they do not "consolidate the assets and liabilities of [the George's] subsidiaries," these statements include all information needed to understand the financial status of George's, Inc. and George's Farms, Inc. for the past five years. These are the two George's corporations the State has sued. George's has presented information about other, non-defendant subsidiaries in the George's, Inc. financial documents as a line item called "Investments in subsidiaries"; this allows the State to see the extent to which the parent corporation, George's, Inc. is invested in other subsidiaries without George's being required to disclose more detailed financial information about other, non-defendant companies. (Ex. B, *See* line item under "Other assets" titled "Investments in subsidiaries").

The State also complains that George's is hiding important financial information, and says this is evidenced by the statements on page 1 of each financial document which indicate that George's has departed from generally accepted accounting principals in presenting the information

to the State, and has elected to omit certain financial disclosures. The affidavit of Greg Flesher, a licensed Certified Public Accountant in the State of Arkansas who assisted in preparing and auditing the George's financial disclosures to the State, employed with the accounting firm of Frost PLLC in Little Rock, Arkansas, addresses this concern by the State. Mr. Flesher testifies in his affidavit that:

The omitted notes to the financial statements merely include a description of the company's accounting policies, as well as more detailed line item information about the larger line items reported in the Balance Sheet or Income Statement. An example would be the Inventories line item in the Balance Sheet. The note for that line item, if it was included, would show the individual feed, breeders, eggs, broilers and finished product that make up the total Inventories shown on the balance sheet. Another example would be the Long-Term Debt line item shown on the Balance Sheet. The note for that line item, if it was included, would list all of the individual notes payable the company has that make up total Long-Term Debt shown on the balance sheet.

Ex. E, at 3. Flesher further explains in his affidavit that, "the Balance Sheets and Statements of Income that George's Inc. and George's Farms, Inc. have already produced to the State provide a full picture of the companies' financial condition." (Ex. E, at 3). Thus, George's has provided all that is needed for the State to get a complete financial picture of the two corporations it has sued as far as its supposed 'ability to pay' analysis is concerned. (Ex. E). The net worth of the two George's defendants and their income over a 5-year period is more than sufficient to do what the State claims it wants to do, without the underlying and truly invasive micro detail of each line item.

George's has already produced all, if not more, financial information than the State is entitled to receive. The State concedes that throughout the course of discovery George's has maintained its objections to the State's requests for its private financial information. These objections have been well-known to the State for years, yet the State only filed this Motion to

Compel a mere eight weeks before the discovery deadline and six weeks *after* the State issued its expert report on damages.

Finally, the State filed its motion and seeks additional documents for an improper purpose: to modify and bolster its expert's opinion when the date for the State to submit its expert reports has long since passed. Unfortunately, the State continues to ignore the Court's scheduling orders and through this Motion to Compel forewarns us of another attempt to bolster one of their expert reports. The State's expert report on damages was originally due on May 1, 2008. *See* Scheduling Order, Dkt. #1075 (Mar. 9, 2007). In October 2007, the Court granted the Plaintiffs an across-the-board delay of expert report deadlines, including pushing their damage report due date to January 5, 2009. Amended Scheduling Order, Dkt. #1376 (November 15, 2007). The aggregation of the State's delays throughout the discovery process has required defense experts to revisit work already completed, in some cases to re-start their work from scratch, and generally impeded Defendants' ability to prepare their case. *See* Defendants' Motion to Enforce Scheduling Order at Dkt. #1759. These multiple late submissions, Magistrate Judge Joyner noted, were "extremely unfortunate" as they were "detrimental to the timely resolution of this case" and "force[d] the Court to extend the date Defendants' expert reports are due." Opinion and Order, Dkt. #1787 (Oct. 28, 2008).

Most recently on January 29, 2009, the Honorable Judge Gregory Frizzell denied the State's attempt to supplement the expert reports of Drs. Cooke and Welch (Dkt. #1839). In this order, the Court affirmed the most recent scheduling order, noting that, "a supplemental expert report that states additional opinions or rationales or seeks to 'strengthen' or 'deepen' opinions expressed in the original expert report exceeds the bounds of permissible supplementation and is subject to exclusion

under Rule 37(c)(1).”<sup>3</sup> The State’s damage expert, David Payne, received all of the information necessary for a clear financial picture of George’s *before* issuing his report, and if he did not the State should have brought the issue to the Court’s attention *before* his report was due.

### III. Argument and Authority

#### A. The State is not Absolutely Entitled to Discover George’s Private Financial Documents

While it is apparent from its Motion that the State would like the court to believe that any and all financial documents requested must be produced the moment a plaintiff alleges punitive damages, the case law actually affords the Court much discretion in determining whether or not such documents must be produced in a case. As the Supreme Court of Oklahoma in the *YWCA of Oklahoma City v. Melson*, “once an objection is interposed, equitable powers should be exercised to decide whether (a) discovery is warranted and (b) if so, whether a protective order is one’s due.” *YWCA of Oklahoma City v. Melson*, 944 P.2d 304, 310 (Okla.1997). The Oklahoma Supreme Court continued by explaining, “a plaintiff’s right to discovery, which is not statutorily unlimited, stands subject to judicial supervision.” *Id.* at 312. George’s has consistently objected to the production of financial documents for 3 years, and this Response and Motion serve as George’s notice to the Court of that objection. Now it is within the discretion of this Court to determine if the discovery is warranted. When balancing this equitable question, George’s urges the Court to consider the good faith exercised by George’s submission of Balance Sheets and Income Statements. It is unquestionable that these documents fully satisfy the needs of the State in terms of assessing George’s current financial condition. (Ex. E, at 3).

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<sup>3</sup> In this statement, the Court was citing *Palmer v. Asarco Inc.*, 2007 WL 2254343, at \*3 (N.D. Okla. Aug. 3, 2007) (quoting *Cook v. Rockwell Int’l Corp.*, 2006 WL 3533049, at \*87 (D. Colo. Dec. 7, 2006).



If the Court determines that any portion of George's private financial documents are discoverable, the scope of that discovery should be limited. Generally, the Northern District of Oklahoma orders that a defendant against whom punitive damages have been claimed must disclose *discrete balance sheets* for financial information showing its net worth for pertinent years. (Emphasis added.) E.g., *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 199 F.R.D. 677, 686 (N.D. Okla. 2001) (relevant year's balance sheet); *Hightower v. Heritage Academy of Tulsa, Inc.*, No. 08-CV-602-GKF-FHM, 2008 WL 2937227, at \*1 (N.D. Okla. July 29, 2008) (balance sheet and net worth for current year only); *Toussaint-Hill v. Montereau in Warren Woods*, No. 07-CV-179 GKF/SAJ, 2007 WL 3231720, at \*1 (N.D. Okla. Oct. 29, 2007) (balance sheet showing net worth for a single year); *City of Tulsa v. Tyson Foods, Inc.*, No. 01-CV-900-B(X), slip op. at 6 (N.D. Okla. May 3, 2002) (Dkt. #1866-2: Ex. I) (net worth for five years). The *Toussaint-Hill* Court cited with favor the District of Kansas decision in *Heartland Surgical Specialty Hospital, LLC v. Midwest Division, Inc.*, 2007 WL 950282, at \*14 (D. Kan. Mar. 26, 2007). In finding that only the most recent and current financial information is relevant to a punitive damages determination, the District of Kansas noted in that case that "the issue is a party's 'financial condition' not their financial history." *Id.*

None of these decisions compelled the parties at issue to produce tax return information, as the State demands of George's. Further, even where a party specifically sought multiple financial documents – such as income statements, profit and loss statements, and cash-flow statements – as the State does in the instant motion, the courts all refused to impose such a requirement, and instead limited the disclosures required. E.g., *Cardtoons* 199 F.R.D. at 686 n.17; *Toussaint-Hill*, 2007 WL 3231720, at \*1. As George's has contended since its response to the State's July 2007 Requests, disclosure of its private financial documents is not required in the instant matter. Further, if any

disclosure is mandated after balancing the equities, George's has already provided more than sufficient information for the State to develop a full understanding of George's financial condition by way of its production of Balance Sheets and Income Statements for the past 5 years.

**B. George's Produced More Information Regarding its Financial Status than Required by Current Case Law**

Although it is at best questionable whether or not the State is entitled to George's private financial documents, George's, in a good-faith attempt to protect the uninterrupted continuity of the trial process, completed two separate productions of its private financial information to the State. *See Exs. A – D.* The State admits that the documents George's provided contain information concerning George's net worth but the State wants documentation as to George's income and cash flow as well as tax returns. (Dkt. #1867, at 5 – 7).

While the State claims the information provided by George's is insufficient to provide a relevant evaluation of George's financial condition, the State cites no legal support for its argument that it needs or is entitled to receive additional financial documentation from George's. Instead, the State offers arguments from its expert concerning additional information he would like to have. These are the same types of arguments that were rejected by the Courts in *Cardtoons*, *Toussaint-Hill*, and *City of Tulsa, et al v. Tyson Foods, et al.*, *supra*.

The State also claims that the financial documents provided by George's contain a disclaimer "regarding the incomplete nature of the information." (Dkt. #1867, at 4). While the indented text quoted by the State is accurate, this text is merely an arcane accounting disclaimer and is not an attestation that the financial documents are in any way incomplete. As further explained by George's accountant, Flesher, "The quoted language in the notes from the balance sheets

prepared on December 1, 2008 and the income statements prepared on December 31, 2008 is mandated accountant language that must be used when notes to financial statements are not included with the financial statements being prepared. To omit that information is defined as a GAAP departure in our arcane accountants' language. . . The omitted notes to the financial statements merely include a description of the company's accounting policies, as well as more detailed line item information about the larger line items reported in the Balance Sheet or Income Statement." (Ex. E, at 2 – 3). To accurately understand the financial condition of George's it is not necessary to see detailed line item information—that is precisely the type of annoying, embarrassing, or oppressive information that falls within the Court's discretion to protect against.

Simply stated George's has already provided all of the financial documents it is required to provide. Moreover, George's has provided *more* documentation than required. The most recent cases have only required a defendant to produce the current year's balance sheets—George's has provided Balance Sheets and Income Statements for the past five years.

**C. The State's Motion to Compel is Untimely and a Supplemental Report by Payne is Barred by the Court's Scheduling Order and Order Regarding Supplemental Expert Reports**

As discussed above, the State initiated this action more than three and a half years ago, yet only filed its Motion to Compel eight weeks before the discovery deadline and six weeks after the State issued its expert report on damages. As stated by this court in *Continental Industries, Inc. v. Integrated Logistics Solutions, LLC*, 211 F.R.D. 442, 444 (N.D.Okla. 2002):

Although Fed.R.Civ.P. 37 does not specify any time limit within which a Motion to Compel must be brought, courts have made it clear that a party seeking to compel discovery must do so in timely fashion. . . A party cannot ignore available discovery remedies for months and then, on the eve of trial, move the court for an order

compelling production. Once. . . a party registers a timely objection to requested production, the initiative rests with the party seeking production to move for an order compelling it. Failure to pursue a discovery remedy in timely fashion may constitute a waiver of discovery violations. (Internal citations omitted.)

*Id.* at 444. Because the State has waited for at worst years and at best months from George's repeated objections to the requests for production file its Motion to Compel, the right to file such a motion should be deemed waived and therefore, this Motion should be denied.

Further, the State contends that the additional financial information they seek – six weeks after Mr. Payne issued his expert report – is “important and relevant information for a fuller analysis” by Mr. Payne. (Dkt. #1867 at 6). Neither the State nor Mr. Payne represent that the additional financial information sought is necessary to this case, or even necessary to Mr. Payne's opinions. (The State merely argues that if they receive the information, Mr. Payne “would need to review it upon receipt.”) (*Id.* at 8.)

Additionally, the State's claim that their expert Mr. Payne would find this information useful in rendering additional and new “Ability to Pay” opinions provides no basis for granting the motion. The State provides no case law showing that a measure for punitive damages may be found in a defendant's sheer “Ability to Pay” a certain amount without necessarily declaring bankruptcy. Not only does the State demand far more financial information than that to which it is entitled under this District's case law, they admittedly seek it in order to belatedly bolster what amounts to a useless expert opinion on damages. Moreover, the State could have brought this to the attention of the Court before the deadline for its expert report.

As noted above, Judge Frizzell has recently and clearly rejected The State's requests to issue yet more expert opinions in this matter. (See Jan. 29, 2009 Orders: Dkt. #1839, #1842.) Nonetheless, the State rather brazenly asserts that it intends to serve a series of supplemental reports

for Mr. Payne should this Court grant their motions to compel additional financial information. (Dkt. #1866 at 8 (Cargill Defendants); #1867 at 8 (George's Defendants) #1868 at 8 (Simmons Foods); #1869 at 7 (Peterson Farms).)

George's respectfully submits that the Court has already determined that the State's expert case is fully disclosed as is, and cannot be supplemented or bolstered this close to trial. Reopening the State's damages expert case would necessitate modifying the entire remaining pretrial schedule, because after the new reports issue at some future time, Defendants would require an extension of their reports responding to the (faulty) opinions of Mr. Payne. This is exactly the sort of additional rounds of expert discovery that Judge Frizzell found "at this late date would unduly increase the cost of this litigation and delay its ultimate resolution." (Jan. 29, 2009 Ord: Dkt. #1842 at 2.)

Additionally, the State seems to hold out the Payne reports as mere preliminary reports, with conclusions reached based only on partial information. (See Dkt. #1867 at 5-6, 8.) The Court should not allow the State to proceed this way because it is contrary to Tenth Circuit law. *Kern River Gas Transmission Co. v. 6.17 Acres of Land*, 156 Fed. Appx. 96, 102 (10th Cir. 2005); *Stone v. Deagle*, 2006 U.S. Dist LEXIS 90430, at \*13 (D. Colo. Dec. 14, 2006).

Moreover, the State cannot now – six weeks after the deadline – for the first time attempt to compel information to underpin their damages reports. If the State truly believed such detailed and far-reaching financial information like tax returns were "necessary" for their expert case, they should have moved to compel sometime between when the dispute over the scope of financial information first arose in September of 2006 and when the damages reports were due on January 5, 2009. Mid-February of 2009 is simply too late to raise this complaint with the Court.

Finally, the State cannot now bolster Mr. Payne's expert report with such information even if Defendants were to provide it. The State admits that they want this information so that Mr. Payne may perform "a fuller analysis." (Dkt. #1867 at 6.) As this Court has held:

A supplemental expert report that states additional opinions or rationales or seeks to "strengthen" or "deepen" opinions expressed in the original expert report exceeds the bounds of permissible supplementation and is subject to exclusion under Rule 37(c)(1). To rule otherwise would create a system where preliminary [expert] reports could be followed by supplementary reports and there would be no finality to expert reports, as each side, in order to buttress its case or position, could "supplement" existing reports and modify opinions previously given. This result would be the antithesis of the full expert disclosure requirements stated in Rule 26(a). (internal citations omitted).

*Cohlmia v. Ardent Health Servs., LLC*, 2008 U.S. Dist. LEXIS 65292, at \*18-19 (N.D. Okla. Aug. 22, 2008) (internal citations omitted). In addition, the State should openly and directly seek a modification of the pretrial schedule to extend the date for disclosure of their expert reports on damages rather than indirectly raising the request within the body of a motion to compel at this late stage in the litigation.

Regardless, the State maintains no legal basis for its demands either as to additional financial information from George's nor as to special leave to file late expert reports. The Court should deny their motion outright, and instruct the State that no such bolstering of Mr. Payne's reports is permitted.

#### **IV. Conclusion**

WHEREFORE, PREMISES CONSIDERED, George's, Inc. and George's Farms, Inc., respectfully request that this Court deny the State of Oklahoma's Motion to Compel George's, Inc. and George's Farms, Inc. to Respond to Discovery Seeking Financial Information (Docket #1867), grant George's, Inc. and George's Farms, Inc. Motion for a Protective Order, deny

admission of a bolstering report of State's proffered expert damages witness Mr. David Payne, and further pray for any and other relief to which they may be entitled.

Respectfully submitted,

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I certify that on the 23<sup>rd</sup> day of February, 2009, I electronically transmitted the attached document to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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